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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936.

No. 459.

SOPHIA BRENNAN, ADMINISTRATRIX, ET AL.,
PETITIONERS,

VS.

SABINE TOWING COMPANY, INC., ET AL.,
RESPONDENTS.

PETITION FOR REHEARING ON PETITION FOR WRIT OF CERTIORARI.

M. G. Adams,
H. C. Hughes,
Counsel for Petitioners.

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Lockhart, Hughes & Lockhart,
Of Counsel.

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PETITION FOR REHEARING.

Come now the above named Sophia Brennan, administratrix of the estate of William Brennan, deceased; Bertha M. Pyle, administratrix of the estate of Orville Glenn Pyle, deceased; Adolphine Durio, administratrix of the estate of Cyrus Durio, deceased; R. L. Causey, administrator of the estate of Stewart Causey, deceased; Ora Kenney, administratrix of the estate of Joseph Hay-

den Kenney, deceased; W. M. Crook, administrator of the estate of C. L. Nelson, deceased; and Ruth Anderson, administratrix of the estate of H. A. Anderson, deceased, and present this their petition for a rehearing in the above entitled cause, and, in support thereof, respectfully show:

We regret the necessity of further pressing upon the attention of this Honorable Court the gravity of the wrongs inflicted upon them by the lower court's decision. That decision, if permitted to stand, will do even greater violence and damage to our established and orderly principles of law.

The original petition for the writ was based exclusively upon issues of law; and no controverted fact issues were involved. Petitioners would not have applied for the writ, in the first instance, if it had been based upon disputed fact issues; but, as shown in the original petition, the facts were entirely without dispute; and, therefore, the findings and decision of the Circuit Court present pure questions of law.

In the original petition we clearly pointed out that there was no controversy about the ages of any of the parties, their joint life expectancies, the time and duration of the employment of the decedents, and the amounts they were contributing and probably would have contributed in the future to their families. Therefore, the question of amount of damages in each claim rested upon facts about which there was no dispute; and, in such circumstances, when a wrong criterion is used for measuring and estimating the damages, the error becomes one of law and not of fact.

The Circuit Court "departed from the accepted and usual course of judicial proceedings," in the following respects:

1. It laid down a palpably incorrect and erroneous criterion for measuring damages in death injury cases; and, in total disregard of the undisputed evidence, determined the amount of damages exclusively upon its own extravagant criterion and upon its own personal opinion.

This is certainly an error of law that should be supervised and corrected by this court.

That this assertion is accurate and not at all exaggerated is amply established by the following excerpt from the opinion:

> "Assuming the testimony of the widows to be truthful, it is beyond dispute that the husbands, upright, faithful and devoted, derived as much benefit from the upkeep and happiness of the families as did the wives. We consider it to be a fair estimate to say the family had lost an amount equivalent to one-half of what the father and husband earned" (R. 450).

Therefore, the lower court held, as a matter of law, despite the undisputed evidence to the contrary, that the families were entitled to only one-half of the earnings of the decedents and that the proper measure of damages was the present worths of such one-half of the earnings. If this be the law—as it assuredly will be unless this court corrects the holding—then in the future it will be useless in any case to make any proof other than that of the salary of the husband and the joint life expectancy of the husband and wife.

In *Brooklyn Eastern Terminal Company* v. *United States*, 287 U. S. 170, 53 S. Ct. 103, 105, involving a proper criterion in determining damage to a yacht, this court, through Mr. Justice Cardozo, states the law that is pointedly applicable to the case at bar:

> "A wide range of judgment is conceded to the triers of the facts in the choice of the standard to be applied and in the method of applying it. The choice, however, may not be arbitrary, nor is the range of judgment without limit. We think that, on the face of this award, there is declared a principle of assessment that, in the setting of the circumstances, exceeds the bounds of any discretion allowed to the assessors. * * * *An assessment of damages may be corrected, if erroneous in point of law, but also it may be corrected if extravagant in fact.*".

If the criterion is erroneous, this court has been quick to grant relief, even though the measure is too low. *Pierce* v. *Tenn. Coal & Iron Ry. Co.*, 173 U. S. 117, 19 S. Ct. 335.

2. The opinion below disregarded the binding effect of the concurrent fact findings of the commissioner and the lower court—a principle established for the benefit of litigants as well as for the appellate courts—a principle so uniformly recognized and applied by all the courts that the bar throughout the United States justly relies upon its enforcement, regardless of whether it be for or against their clients. There was not the slightest legal justification for making this case an exception to the general rule. The commissioner made specific findings and assessed the damages based thereon and made his report to the trial court (R. 341-353). The District Court,

after reviewing the evidence, approved these findings and entered final judgment based thereon (R. 391-396). If these statements be questioned, we respectfully request the court to read the findings of the commissioner and the approval thereof by the trial court.

Thus, the Circuit Court, without evidence, set aside the concurrent findings of two lower tribunals, which were not only amply supported, but based upon undisputed testimony.

This action of the court was error and raised a conflict in the authorities with respect to the conclusive and binding effect which should be given to the concurrent decisions of two lower tribunals and should be revised by this court. In all other circuits all parties would be concluded by these concurrent findings. The Fifth Circuit, in other cases, has followed the general rule, but it has made an exception in the instant case; and, realizing that it should have some justification for deserting and refusing to follow the usual path, it gives "the lame and impotent" reason that the commissioner did not "specifically find the facts as to any claim" (R. 448); but the record clearly and conclusively demonstrates that the commissioner did find the specific facts underlying each claim, as above shown.

The Supreme Court has consistently followed the rule that it will not disturb the concurrent fact findings of two lower courts, unless their findings are clearly erroneous. This rule obtains and is applied by all the Circuit Courts of Appeals and by this Honorable Court with respect to

the findings of commissioners and trial courts. *Davis* v. *Schwartz*, 155 U. S. 631, 15 S. Ct. 237, 239; *The Eastland* (CCA 7), 78 F. (2d) 984, 988; *The June Ames* (CCA 2), 66 F. (2d) 415; *Packard* v. *Southern States Power Co.* (CCA 5), 46 F. (2d) 789.

In *The June Ames, supra,* the Second Circuit said:

> "The issue depended upon whom to believe, and the commissioner's finding, in such a case, certainly when affirmed by the judge, is conclusive. This seems a hard lesson for the Bar to learn, but we will not slacken our rule regarding it."

This presents a question of uniformity in the admiralty law and practice and is one which should be considered and enforced by this court.

3. The awards made by the Circuit Court were not based upon any evidence, but were based exclusively upon conjecture and the personal opinion of that court.

The whole theory upon which the court below proceeded to judgment was plainly erroneous in law, and in fact because "upright, faithful and devoted husbands" do not spend their salaries on the basis of receiving one-half of the returns, or one-half of the pleasure and benefit from the family life; but they devote their earnings to the maintenance of their families because of the love which they have for them and without any motive of financial reward. When the husband is dead, the family is deprived of his income; and to say, as a matter of law, because he is no longer with them, that they are entitled to only one-half of his income is such a preposterous error of law and extravagant criterion of damages that it should

be corrected and not permitted to have even the apparent approval of this Honorable Court.

4. The decision below penalized the widows who had children by deducting from the amounts that should have been awarded them the amounts awarded the minors as compensation for loss of parental love, care and training; such compensation to the minors being, as a matter of law, an entirely separate and distinct item from the present worth of the money contributions. This is contrary to justice and to common sense. A widow who has children should receive more consideration, if any difference be permitted, than those who have not.

Both the federal and state governments are directly concerned that all trials be fairly and impartially conducted. In *New York Cent. R. Co.* v. *Johnson*, 279 U. S. 310, 49 S. Ct. 300, 73 L. Ed. 710, this court has well said:

> "But a trial in court is never, as respondents in their brief argue this one was, 'purely a private controversy of no importance to the public.' The state, whose interest it is the duty of court and counsel alike to uphold, is concerned that every litigation be fairly and impartially conducted and that verdicts of juries be rendered only on the issues made by the pleadings and the evidence. *Brasfield* v. *United States*, 272 U. S. 448, 450, 47 S. Ct. 135, 71 L. Ed. 345."

The cardinal principle of our law that judgments must be based upon the evidence before the court and that neither courts nor juries shall be permitted to disregard the evidence and determine the issues from personal opinion has, in this case, been plainly violated.

The decision below was the opposite of liberal, as liberality, in construing the statutes passed for the benefit of seamen and their families, has been construed by this court. This court has held that the statutes of limitation of liability passed for the benefit of shipowners must be construed liberally. *Deslions* v. *La Compagnie, etc.*, 210 U. S. 95, 28 S. Ct. 664, 52 L. Ed. 973. In this case the court stated its policy, with respect to construing the statute liberally, in the following words:

> "Nevertheless, the practical value of the law will largely depend on the manner in which it is administered. If the courts having the execution of it administer it in a spirit of fairness, with the view of giving to shipowners the full benefit of the immunities intended to be secured by it, the encouragement it will afford to commercial operations will be of the last importance; but, if it is administered with a tight and grudging hand, construing every clause most unfavorably against the shipowner, and allowing as little as possible to operate in his favor, the law will hardly be worth the trouble of its enactment. Its value and efficiency will also be greatly diminished, if not entirely destroyed, by allowing its administration to be hampered and interfered with by various and conflicting jurisdictions."

The foregoing was said with respect to statutes passed for the benefit of the shipowners, who have always been amply able to take care of themselves; but here we have people involved who are generally considered as requiring the special protection of the courts. Does liberal construction mean only the liberal construction of the wording of the statute, or does it mean also the liberal administration of the law with respect to obtaining

proper results under the statutes enacted for the seamen's benefit? If a liberal construction of the words only is to be given, then this law also will be "hardly worth the trouble of its enactment." It is particularly necessary and appropriate that this Honorable Court require a liberal construction and application of these statutes passed in behalf of "wards of admiralty," if that fine phrase is to be translated into an accomplished fact and not permitted to remain but "as sounding brass, or a tinkling cymbal."

Though the granting of the writ in the Van Beeck case was plainly correct, the principle there in issue was of slight importance in comparison with those involved in the instant case. There the proper construction of a statute was in question, but here is involved, among other things, the all-important issue of whether this court will permit a lower court to disregard the evidence and render judgment, not upon the testimony before it, but exclusively upon its own personal opinion.

The questions involved in this case are, therefore, of paramount importance. The decision lays down a rule of law rendering illiberal that which this court says should be liberal. We realize that the time of this court should be conserved and given only to those questions that concern the welfare of the entire country. Such a situation we have here. No additional time of this court will be taken for the consideration of this entire case, since a partial writ has already been granted herein. The whole question can be argued and decided in the same time as will be required to hear the question already before this

court. The entire matter is one of law and not of fact and is of supreme importance not only to the litigants, but to the jurisprudence of the country as well. The errors of the lower court consist in disregarding the fundamental safeguards which this court, since its foundation, has been careful to uphold.

For the foregoing reasons it is respectfully urged that this petition for a rehearing be granted, that the writ of certiorari be issued as originally prayed for, and that the judgment of the Circuit Court of Appeals be, upon further consideration, reformed and modified in conformity with the evidence and the law.

Respectfully submitted,

M. G. ADAMS,
H. C. HUGHES,
Counsel for Petitioners.

Certificate of Counsel.

I, M. G. Adams, counsel for the above named Sophia Brennan, administratrix *et al.*, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

....,
Counsel for said Petitioners.